

***United States Court of Appeals
for the Second Circuit***

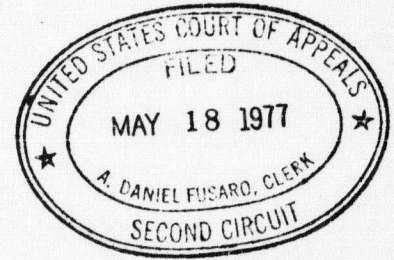


**BRIEF FOR
APPELLEE**

77-7085

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-7085



NORMAN J. BERNSTEIN, Husband,
Plaintiff - Appellant,

vs.

STATE OF FLORIDA, RAYMOND E. RHODES,
Clerk and Individually, ALBAN E. BROOKE,
DONALD S. REISMAN, MARGUERITE H. BERNSTEIN,
wife,

Defendants - Appellees.

Appeal from the United States District Court for the
District of Vermont

BRIEF OF APPELLEES, THE
STATE OF FLORIDA & RAYMOND E. RHODES

ROBERT L. SHEVIN
Attorney General

CLARENCE HOLMES
Assistant Attorney General

Department of Legal Affairs
Civil Division
725 South Calhoun Street
Tallahassee, Florida 32304

Attorneys for Appellees, the State
of Florida and Raymond E. Rhodes

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	iii
Preliminary Statement	1
Statement of Issues	2
Statement of the Case	3
Summary of Argument	5
Argument	7
Point I	8
Point II	11
Point III	14
Conclusion	19
Certificate of Service	20

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Avery v. Bender</u> 126 Vt. 342, 245 (1967)	17
<u>Barber v. Barber</u> 21 How. (62 U.S.) 582, 584 (1859)	8
<u>Begar v. Ujlaki</u> 4 F.R.D., 352 (D.C. Pa. 1945)	17
<u>Bennet v. People of State of California</u> 406 F.2d 36 (9th Cir. 1969), cert. den., 394 U.S. 966	9
<u>Cheramie v. Tucker</u> 493 F.2d 586	9
<u>Collins v. State of Florida</u> 432 F.2d (5th Cir. 1970)	5,8
<u>Davis v. Mcatcer</u> 431 F.2d 81 (8th Cir. 1970)	12
<u>Eldeman v. Jordan</u> 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974)	10
<u>Ex Parte Young</u> 209 U.S. 123, 156 (1908)	5,10
<u>Francis v. Davidson</u> 340 F.Supp. 351, Affd. 93 S.Ct. 223, 409 U.S. 904, 34 L.Ed.2d 168 (1972)	10
<u>Hansen v. Denckla</u> 357 U.S. 235, 231 (1958)	17

TABLE OF AUTHORITIES (CONT'D)

<u>CASES</u>	<u>PAGE</u>
<u>Harrison v. Prather</u> 404 F.2d 267 (5th Cir. 1968)	18
<u>Honda Association v. Nozawa Trading, Inc.</u> 374 F.Supp. 886 (S.D. N.Y. 1974)	15
<u>Jaynes v. Jaynes</u> 496 F.2d 9 (2nd Cir. 1974)	16
<u>McGarr v. Hayford</u> 52 F.R.D. 219 (D.C. Col. 1971)	16
<u>O'Neill v. Battisti</u> 472 F.2d 789, cert. den. 93 S.Ct. 2142, 411 U.S. 964, 36 L.Ed.2d 685 (1972)	15,16
<u>Parden v. Terminal Ry of Alabama States Docks Department</u> 377 U.S. 184, 12 L.Ed.2d 233 (1964)	10
<u>Pennoyer v. Neff</u> 95 U.S. 714 (1877)	5,8
<u>Pierson v. Ray</u> 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967)	11,12
<u>Smallwood v. United States</u> 358 F.Supp. 398 (E.D. Miss. 1973)	12
<u>Sosna v. Iowa</u> 419 U.S. 393, 42 L.Ed.2d 532, 95 S.Ct. 553 (1975)	9
<u>Stewart v. Minnick</u> 409 F.2d 826 (9th Cir. 1969)	12
<u>Sullivan v. Kelleher</u> 405 F.2d 486 (1st Cir. 1968)	5

TABLE OF AUTHORITIES (CONT'D)

CASES

PAGE

Uniroyal Inc. v. Sperberg
63 F.R.D. 55 (S.D. N.Y. 1973)

14,15

OTHER

28 U.S.C. §1391(b)

14

1A, Barron and Holtzoff, Federal
Practice and Procedure, §343, p. 284

17

PRELIMINARY STATEMENT

The Brief on behalf of Defendants, Raymond E. Rhodes and the State of Florida, shall refer to the parties as they appeared in the District Court below. There, the Appellant was Plaintiff and the Appellees were Defendants. References to the record on appeal will be designated by the use of the symbol "R".

STATEMENT OF ISSUES

I

WHETHER THE SOVEREIGN IMMUNITY OF THE STATE OF FLORIDA PROTECTS IT FROM CIVIL SUITS BROUGHT PURSUANT TO 42 U.S.C. §1983.

II

WHETHER THE CLERK OF A FLORIDA DISTRICT COURT OF APPEAL, ACTING WITHIN THE SCOPE OF HIS OFFICIAL DUTIES, IS PROTECTED FROM CIVIL SUIT BY VIRTUE OF THE DOCTRINE OF JUDICIAL IMMUNITY.

III

WHERE THE ACTION AROSE IN FLORIDA AND ALL INDIVIDUAL DEFENDANTS RESIDE IN FLORIDA, DO VENUE AND PERSONAL SERVICE REQUIREMENTS PERMIT FILING AND PROSECUTION OF A CIVIL SUIT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT?

STATEMENT OF THE CASE

This case comes before this Court on appeal of a final judgment of dismissal entered by the United States District Court for the District of Vermont. (R-17). On September 30, 1976, Plaintiff filed this Complaint in the United States District Court for the District of Vermont, against the State of Florida; Raymond E. Rhodes, the Clerk of Florida's First District Court of Appeal; Alban E. Brooke, his former wife's attorney in a Florida divorce proceeding; Donald S. Reisman, his own counsel; and his former wife, Marguerite H. Bernstein. (R-1). The Complaint alleges that a judgment of divorce in a Florida proceeding, in which all Defendants participated, violated Plaintiff's right protected by the First and Fourteenth Amendments to the United States Constitution. At the time of his Complaint, Plaintiff was, and presently is, a citizen of Vermont. All Defendants except the State of Florida are citizens of said state, and all Defendants were served by summons within the territorial jurisdiction of the State of Florida. On November 3, 1976, Defendant Raymond E. Rhodes and the State of Florida by and through their legal counsel, the Florida Attorney General,

moved to dismiss the Plaintiff's Complaint for lack of personal and subject matter jurisdiction and improper venue. (R-2). All other Defendants also moved to dismiss the Plaintiff's Complaint.

The Plaintiff seeks a judgment declaring the divorce laws of Florida to be unconstitutional, and his divorce obtained in that state to be null and void. Further, Plaintiff seeks money damages against the State of Florida, Defendant Rhodes and the two Defendant attorneys. Additionally, Plaintiff seeks a judgment encouraging reconciliation of the spouses "to restore the parties to their lawful and godly position as husband and wife." (R-1). Finally, Plaintiff requests temporary and permanent injunctive relief to support any decree that the Court might award. On February 1, 1977, the District Court entered a Memorandum and Order which explained that Plaintiff's action against all Defendants must be dismissed. (R-16). Pursuant to the Court's Memorandum and Order on February 8, 1977, the Clerk entered final judgment of dismissal. (R-17). From said final judgment, this appeal ensued.

SUMMARY OF ARGUMENT

The United States Supreme Court has disclaimed altogether any jurisdiction in the courts of the United States upon the subject of divorce. Pennoyer v. Neff, 95 U.S. 714 (1877). Civil rights actions against the states are barred by the Eleventh Amendment of the United States Constitution. Section 1983 of 42 U.S.C. subjects "every person who deprives another of his rights to liability for such acts." States, however, are not "persons" within the meaning of §1983. Collins v. State of Florida, 432 F.2d (5th Cir. 1970). The Eleventh Amendment of the United States Constitution immunizes states against suit by its citizens as well as citizens of other states. Fitts v. McGhee, 172 U.S. 516, 43 L.Ed. 535 (1899). Plaintiff's prayer for injunctive relief against the State of Florida fails to come within the exception permitted by Ex parte Young, 209 U.S. 123, 156 (1908), inasmuch as no executive officer of the state is made a party.

The Defendant Rhodes, as Clerk of the First District Court of Appeal, is protected by the doctrine of judicial immunity. Sullivan v. Kelleher, 405 F.2d 486 (1st Cir. 1968). Additionally, none of the Defendants were served or found

within the State of Vermont. Since the action is not based entirely on diversity of citizenship and the claim did not arise in Vermont, the action fails to meet the venue requirements imposed by 28 U.S.C. §1391A.

A R G U M E N T

POINT I

WHETHER THE SOVEREIGN IMMUNITY OF THE STATE
OF FLORIDA PROTECTS IT FROM CIVIL SUITS
BROUGHT PURSUANT TO 42 U.S.C. §1983.

All of the allegations of Plaintiff's Complaint stem from a Florida divorce proceeding in which Plaintiff was a party thereto. (R-1). Plaintiff states that a Florida Court issued a final judgment, dissolving his marriage. It is further alleged that Plaintiff appealed the judgment, but said appeal was dismissed for lack of prosecution (R-1). Plaintiff argues that all of Florida's divorce laws are unconstitutional but he does not attempt to explain why or how said laws are unconstitutional.

At the outset, it is worthy to note that the United States Supreme Court has disclaimed "altogether any jurisdiction in courts of the United States upon the subject of divorce." Barber v. Barber, 21 How. (62 U.S.) 582, 584 (1859). In Pennoyer v. Neff, 95 U.S. 714 (1877), Justice Fields observed:

The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created and the causes for which it may be dissolved.

See also Sosna v. Iowa, 419 U.S. 393, 42 L.Ed.2d 532, 95 S.Ct. 553 (1975).

Insofar as Plaintiff attempts to sue the State of Florida pursuant to 42 U.S.C. Section 1983, it is submitted that states are not subject to suit under said section. Section 1983 subjects "every person who deprives another of his rights to liability for such acts." However, states and state agencies are not "persons" within the meaning of Section 1983. Collins v. State of Florida, 432 F.2d 60 (5th Cir. 1970). Bennet v. People of State of California, 406 F.2d 36 (9th Cir. 1969), cert. den., 394 U.S. 966. Cheramie v. Tucker, 493 F.2d 586.

A state's sovereign immunity evolves from the Eleventh Amendment to the United States Constitution. The Eleventh Amendment prohibits suit against unconsenting states and provides as follows:

"the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."
(e.s.)

It is well settled that the Eleventh Amendment immunizes unconsenting states from suits by its citizens as well as citizens of other states. Fitts v. McGhee, 172 U.S. 516, 43

L.Ed. 535 (1899); Parden v. Terminal Ry of Alabama States Docks Dept., 377 U.S. 184, 12 L.Ed.2d 233 (1964); Francis v. Davidson, 340 F.Supp. 351, Affd. 93 S.Ct. 223, 409 U.S. 904, 34 L.Ed.2d 168 (1972). The State of Florida has not consented to be sued in this action. Accordingly, as to this Defendant, the District Court lacked subject matter jurisdiction and correctly dismissed Plaintiff's Complaint. The Eleventh Amendment also prohibits the award of money damages against states. Eldeman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974). Also Plaintiff's request for injunctive relief against the State of Florida is barred since no executive officer is named as a party. Ex parte Young, 209 U.S. 123, 156 (1908).

POINT II

WHETHER THE CLERK OF A FLORIDA DISTRICT COURT OF APPEAL, ACTING WITHIN THE SCOPE OF HIS OFFICIAL DUTIES, IS PROTECTED FROM CIVIL SUIT BY VIRTUE OF THE DOCTRINE OF JUDICIAL IMMUNITY.

Plaintiff claims that Defendant Rhodes violated his constitutional rights in that this Defendant allegedly frustrated Plaintiff's efforts to effect an appeal of his Florida divorce proceeding (R-1). Specifically Plaintiff alleges that:

"...Defendant Rhodes was hostile, belligerent, non-responsive and on one occasion hung up on plaintiff in the course of a phone call, all in abuse of his official position." (R-1)

In Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), the United States Supreme Court held that judges are absolutely immune from liability for damages in suits brought pursuant to 42 U.S.C. Section 1983. In that case Petitioners sought money damages against a state judicial officer and local police for civil rights deprivations due to alleged racial discrimination. The United States Supreme Court, however, rejected all claims of damages against judicial officers:

We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions.... Few doctrines were more solidly established at common law than the immunity of judges from liability for damages....Pierson v. Ray, supra at 553.

* * *

We do not believe that this settled principle of law was abolished by §1983... 386 U.S. at 554.

On the face of the Complaint, it is beyond doubt that the alleged acts of Defendant Rhodes were within the realm of his official duties as Clerk of the First District Court of Appeals (R-1). Clerks of Court who act as did Defendant Rhodes, within the scope of their official duties, are clothed with judicial immunity to the same extent as a judge. Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969); Davis v. Mcatcer, 431 F.2d 81 (8th Cir. 1970); Sullivan v. Kelleher, 405 F.2d 486 (12th Cir. 1968); see also Smallwood v. United States, 358 F.Supp. 398 (E.D. Miss. 1973).

In Stewart, supra, Plaintiff alleged that a Court Clerk violated his constitutional rights in that the Clerk allegedly refused to furnish Plaintiff a portion of a state criminal trial transcript. The Court of Appeals for the Ninth Circuit held that the alleged acts of the Court Clerk

were acts performed in his capacity as a quasi-judicial officer and, accordingly, the Clerk of Court was protected by the doctrine of judicial immunity. All of the allegations of Plaintiff's Complaint against Defendant Rhodes in this case relate to the performance of his official duties. Hence, Defendant Rhodes is protected by the doctrine of judicial immunity. He is not subject to civil suit for these alleged acts. Hence, the District Court properly dismissed Plaintiff's Complaint as against this Defendant.

POINT III

WHERE THE ACTION AROSE IN FLORIDA AND ALL INDIVIDUAL DEFENDANTS RESIDE IN FLORIDA, DO VENUE AND PERSONAL SERVICE REQUIREMENTS PERMIT FILING AND PROSECUTION OF A CIVIL SUIT IN THE DISTRICT OF VERMONT?

Plaintiff commenced this action in the United States District Court, District of Vermont. However, the Complaint reveals that all Defendants except the State of Florida are citizens of Florida, and were so domiciled at the time Plaintiff commenced this action (R-1). Under these circumstances, it is submitted that Plaintiff has chosen an improper venue.

As stated supra, it is Defendant's belief that Plaintiff bases jurisdiction upon the provisions of 42 U.S.C. §1983 et. seq. That being the case, venue must be determined pursuant to 28 U.S.C. §1391(b), which provides:

A civil action wherein jurisdiction is not founded solely on the diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose....

The district in which the claim arose for purposes of §1391(b) is the district in which the aggregate of the operative facts upon which the Complaint is based occurred. Uniroyal Inc.

v. Sperberg, 63 F.R.D. 55 (S.D. N.Y. 1973). Section 1391(b) does not extend to the Plaintiff a right to sue in any district in which any part of his claim, however small, arose. The district in which a claim arises is the district in which the largest, most substantial part of the claim occurred. Honda Association v. Nozawa Trading, Inc., 374 F.Supp. 886 (S.D. N.Y. 1974).

The aggregate of the operative facts upon which Plaintiff's claim is based is that a judgment of divorce in a Florida proceeding, in which all individual Defendants participated, violated his rights protected by the First and Fourteenth Amendments of the United States Constitution. Specifically, Defendant Rhodes is alleged to have frustrated Plaintiff's attempt to effect an appeal of the decree within the Florida judicial system.

Defendants argue that Plaintiff's alleged claim arose within the State of Florida. Not only are all principals located in Florida, but so are the majority of witnesses who might be called to testify in respect to Plaintiff's claims.

In O'Neill v. Battisti, 472 F.2d 789, cert. den. 93 S.Ct. 2142, 411 U.S. 964, 36 L.Ed.2d 685 (1972), a judge

brought a federal suit against all justices of the Supreme Court of Ohio in the Northern District of that state. The Sixth Circuit held that venue was improper and stated:

It is clear that venue does not lie in the Northern District of Ohio in the action filed there by Judge Heitzler against the Justices of the Supreme Court of Ohio. Under 28 U.S.C. §1391(b), a civil action must be brought in the judicial district where all the defendants reside or where the claim arose. The official residence of the Supreme Court of Ohio is in the place where it performs its official duties, that is, Columbus, the State Capital and the seat of State Government...Columbus is in the Southern District of Ohio.

In the instant suit proper venue lies in one of the Districts of Florida rather than the District of Vermont. Accordingly, the District Court did not err in dismissing Plaintiff's Complaint for improper venue. Jaynes v. Jaynes, 496 F.2d 9 (2nd Cir. 1974).

In order for a Federal Court to obtain personal jurisdiction over a Defendant, it must appear that the Defendant has some nexus with the State in which that Court sits. McGarr v. Hayford, 52 F.R.D. 219 (D.C. Col. 1971). In this case, Plaintiff erroneously filed suit in the United States District Court for the District of Vermont. On the face of the Complaint, it affirmatively appears that only

the Plaintiff resides in the State of Vermont (R-1). The official residence of Defendant Rhodes is Tallahassee, Florida, the location of the First District Court of Appeal of which he is the Clerk. Service of process was attempted to be made on Defendant Rhoes in Tallahassee, Florida, but said service did not come within the provisions of Rule 4(E), Federal Rules of Civil Procedure. Further, none of the Defendants were within the reach of Vermont's long arm statute. Hansen v. Denckla, 357 U.S. 235, 231 (1958); Avery v. Bender, 126 Vt. 342, 245 (1967).

Under Rule 12(b), Federal Rules of Civil Procedure, there is no longer any necessity for appearing specially to protest the Court's jurisdiction over a defendant's person. See 1A, Barron and Holtzoff, Federal Practice and Procedure, §343, p. 284. All objections to jurisdiction and process may be presented in a Motion or Answer without waiving any of them. Rule 12(b), Federal Rules of Civil Procedure.

In Begar v. Ujlaki, 4 F.R.D., 352 (D.C. Pa. 1945), Plaintiff filed suit in a Pennsylvania District Court and the Defendant was served with process in Ohio. The Court held that Federal District Court in Pennsylvania lacked jurisdiction over the person of Defendant, which would have required dismissal of Plaintiff's Complaint.

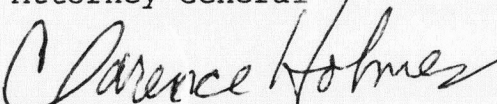
Since all Defendants reside in the State of Florida and Plaintiff has failed to allege any facts which would give this Court in personam jurisdiction, Defendants respectfully urge this Court to affirm the District Court's dismissal of Plaintiff's Complaint for improper service of process. See Harrison v. Prather, 404 F.2d 267 (5th Cir. 1968).

C O N C L U S I O N

The State of Florida is immune from suit in the present case due to the immunity provided by the Eleventh Amendment of the United States Constitution. Florida has not waived its sovereign immunity. Defendant Rhodes as Clerk of Florida's First District Court of Appeals is protected from this civil suit by virtue of the doctrine of judicial immunity. Commencing this action in the District Court for the District of Vermont amounts to improper venue. The attempted service of process upon Defendants was also improper. Therefore, as to the State of Florida and Raymond E. Rhodes, the District Court did not commit error in its dismissal of Plaintiff's Complaint and said judgment should be affirmed by this Court.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General


CLARENCE HOLMES
Assistant Attorney General

Department of Legal Affairs
Civil Division
725 South Calhoun Street
Tallahassee, Florida 32304
904/488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy
of the foregoing Brief of Appellees was forwarded, by
U.S. Mail, to NORMAN J. BERNSTEIN, ESQUIRE, Thompsonburg,
Londonderry, Vermont 05148, this 16th day of May, 1977.

Clarence Holmes
CLARENCE HOLMES